U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANTHONY J. WILLIAMS and U.S. POSTAL SERVICE,
POST OFFICE, New York, N.Y.

Docket No. 96-1561; Submitted on the Record;
Issued June 2, 1998

DECISION and ORDER

Before MICHAEL J. WALSH, MICHAEL E. GROOM,
BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly denied appellant's request for merit review.

The Board has duly reviewed the case record in the present appeal and finds that the case is not in posture for decision.

The only decision before the Board on this appeal is the Office's January 19, 1996 decision denying appellant's request for a review on the merits of its September 27, 1993 decision.[1] Because more than one year has elapsed between the issuance of the Office's September 27, 1993 decision and April 23, 1996, the date appellant filed his appeal with the Board, the Board lacks jurisdiction to review the September 27, 1993 decision.[2]

To require the Office to reopen a case for merit review under section 8128(a) of the Federal Employees' Compensation Act,[3] the Office's regulations provide that a claimant must: (1) show that the Office erroneously applied or interpreted a point of law; (2) advance a point of law or a fact not previously considered by the Office; or (3) submit relevant and pertinent evidence not previously considered by the Office.[4] To be entitled to a merit review of an Office decision denying or terminating a benefit, a claimant also must file his or her

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[1] In its September 27, 1993 decision, the Office denied appellant's claim that he sustained a recurrence of disability on or after June 1, 1993 due to his October 13, 1979 employment injury, aggravation of preexisting seizure disorder.

[2] *See* 20 C.F.R. § 501.3(d)(2).

[3] 5 U.S.C. §§ 8101-8193. Under section 8128 of the Act, "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application." 5 U.S.C. § 8128(a).

[4] 20 C.F.R. §§ 10.138(b)(1), 10.138(b)(2).

application for review within one year of the date of that decision.[5] When a claimant fails to meet one of the above standards, it is a matter of discretion on the part of the Office whether to reopen a case for further consideration under section 8128(a) of the Act.[6] The Board has found that the imposition of the one-year limitation does not constitute an abuse of the discretionary authority granted the Office under section 8128(a) of the Act.[7]

In its January 19, 1996 decision, the Office properly determined that appellant failed to file a timely application for review. The Office rendered its last merit decision on September 27, 1993 and appellant's request for reconsideration was dated November 16, 1995, more than one year after September 27, 1993. Appellant alleged that a September 23, 1994 letter constituted a reconsideration request. This letter does not constitute a reconsider request in that it indicated that a reconsideration request would be filed at a later date.[8]

In its January 19, 1996 decision, the Office indicated that appellant was not entitled to merit review, because his reconsideration request was untimely. The Office, however, may not deny an application for review solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under section 8128(a) of the Act, when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application establishes "clear evidence of error."[9] Office procedures provide that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[10] To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[11] The evidence must be positive, precise and explicit and must manifest on its face that the Office committed an error.[12] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[13] Because the Office used an improper standard in denying

[5] 20 C.F.R. § 10.138(b)(2).

[6] *Joseph W. Baxter*, 36 ECAB 228, 231 (1984).

[7] *Leon D. Faidley, Jr.*, 41 ECAB 104, 111 (1989).

[8] The record also contains a document dated September 10, 1994 and entitled "[r]econsideration [a]ppeal [b]rief" but it appears that this document was first received by the Office on December 18, 1995.

[9] *Charles J. Prudencio*, 41 ECAB 499, 501-02 (1990).

[10] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991). The Office therein states, "The term 'clear evidence of error' is intended to represent a difficult standard. The claimant must present evidence which on its face shows that the Office made an error (for example, proof of a miscalculation in a schedule award). Evidence such as a detailed, well-rationalized medical report which, if submitted prior to the Office's denial, would have created a conflict in medical opinion requiring further development, is not clear evidence of error and would not require a review of the case...."

[11] *See Dean D. Beets*, 43 ECAB 1153, 1157-58 (1992).

[12] *See Leona N. Travis*, 43 ECAB 227, 240 (1991).

[13] *See Jesus D. Sanchez*, 41 ECAB 964, 968 (1990).

appellant's reconsideration request, the case will be remanded to the Office for a proper evaluation of appellant's reconsideration request[14] and a determination regarding whether appellant is entitled to merit review of the Office's September 27, 1993 decision denying his claim.

The decision of the Office of Workers' Compensation Programs dated January 19, 1996 is set aside and the case remanded to the Office for further proceedings consistent with this decision of the Board to be followed by an appropriate decision.

Dated, Washington, D.C.
June 2, 1998

Michael J. Walsh
Chairman

Michael E. Groom
Alternate Member

Bradley T. Knott
Alternate Member

[14] Appellant provided argument in support of his claim in conjunction with his November 16, 1995 reconsideration request.